Yii Chee Ming v Teo Ah Khing @ Teo Cho Teck & Anor

HIGH COURT (KUCHING) — SUIT NO 22–156 OF 1999 III(II)
LAU BEE LAN J
31 MAY 2005

Civil Procedure — Stay of proceedings — Application for — Forum conveniens — Whether court in Republic of Singapore was a more natural or appropriate forum in trying matters in dispute

Civil Procedure — Stay of proceedings — Application for — Plaintiff applied for leave to re-amend writ of summons and statement of claim to add alternative prayers for relief — Whether plaintiff's action an abuse of process of court

The defendants had earlier made a stay application which was dismissed (*YiiChee Ming v Teo Ah Khing & Anor* [2001] 4 MLJ 251). Following that the plaintiff had applied for leave to re-amend the writ of summons and statement of claim to add alternative prayers for relief. The defendants applied for a stay of all further proceedings in this action on the premise that: (a) the plaintiff's action was an abuse of the process of this court; and (b) that the court in the Republic of Singapore was a more natural or appropriate forum in trying the matters in dispute in this action herein. The plaintiff objected to the defendants' application for, *inter alia*, that: (a) the application for stay of proceedings was *res judicata*; and (b) the court in the Republic of Singapore was not the proper forum, ie the issue of *forum non conveniens*.

Held, allowing the defendants' application for stay of proceedings with costs:

(1) By the re-amendment in terms of adding in the alternative prayers for relief, the nature of the reliefs sought for by the plaintiff became different. Therefore, the objection of *res judicata* raised was devoid of merit and cannot be sustained (see para 16); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 distinguished.

(2) Having had leave of the court to re-amend the writ of summons and statement of claim by adding the alternative prayers of relief, the plaintiff was seeking the court to adjudicate not only the plaintiff's monetary claim (pre-amendment) but also on the declaration of the trust, if any, created over the party in favour of the plaintiff. The plaintiff's action was an abuse of the process of the court (see para 32).

(3) In the context of the instant case, the court in the Republic of Singapore was the more appropriate forum since the plaintiff had now pleaded and prayed for the 1/2 share in the property which was located in Singapore to be held in trust by a Singapore company, ie second defendant for the plaintiff. Therefore the applicable law with regard to the property and the administration of the trust should be Singapore law. This was after having regard to the fact that there was no written contract in respect of the plaintiff's action (see para 39).

[**Bahasa Malaysia summary**

Defendan-defendan telah pada mulanya membuat satu rayuan untuk penggantungan prosiding yang telah ditolak (*Yii Chee Ming v Teo Ah Khing & Anor* [2001] 4 MLJ 251). Seterusnya plaintif telah memohon untuk kebenaran untuk pindaan semula writ saman dan penyata tuntutan untuk menambahkan permohonan relif alternatif. Defendan-defendan memohon untuk penggantungan semua prosiding akan datang dalam tindakan ini atas sebab bahawa: (a) tindakan plaintif merupakan penyalahgunaan proses mahkamah; dan (b) mahkamah diRepublik Singapura adalah forum yang lebih sesuai dan natural dalam membicarakan perkara yang dipertikaikan dalam tindakan ini. Plaintif membantah permohonan defendan kerana, antara lain: (a) permohonan untuk penggantungan prosiding adalah *res judicata;* dan (b) mahkamah di Republik Singapura bukan forum yang wajar, ie isu *forum non conveniens*.

Diputuskan, membenarkan permohonan defendan untuk penggantungan prosiding dengan kos:

(1) Dengan membuat pindaan semula dan menambahkan permohonan-permohonan untuk relif alternatif, sifat relif yang dituntut oleh plaintif tidak lagi sama. Oleh itu, bantahan *res judicata* yang dibangkit tidak mempunyai merit dan tidak boleh disokong (lihat perenggan 16); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 dibeza.

(2) Dengan adanya kebenaran mahkamah untuk membuat pindaan semula writ saman dan penyata tuntutan dengan menambahkan permohonan relif alternatif, plaintif memohon mahkamah membicarakan bukan sahaja tuntutan kewangan plaintif (sebelum pindaan) tetapi juga atas deklarasi amanah, jika ada, atas pihak yang memihak kepada plaintif. Tindakan plaintif merupakan penyalahgunaan proses mahkamah (lihat perenggan 32).

(3) Dalam konteks kes ini, mahkamah di Republik Singapura adalah forum yang lebih sesuai kerana plaintif memohon untuk 1/2 bahagian dalam harta yang terletak di Singapura untuk dipegang atas amanah oleh sebuah syarikat Singapura, iaitu defendan kedua untuk plaintif. Oleh itu undang-undang yang patut digunakan berhubung dengan harta dan pentadbiran pemegangan amanah itu sepatutnya undang-undang Singapura. Ini adalah selepas mengambil kira fakta bahawa tiada kontrak bertulis berkenaan dengan tindakan plaintif (lihat perenggan 39).]

Notes

For cases on application for stay of proceedings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5503–5513.

For stay of proceedings, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.06-076]–[10.6-081].

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)
Eng Liat Kiang v Eng Bak Hern & Ors [1995] 1 SLR 577 (refd)
Spiliada Maritime Corp v Cansulax Ltd, The Spiliada [1987] AC 460 (refd)
Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd [1992] 2 MLJ 146 (refd)
Syarikat Bumiputra Kimanis v Tan Kok Voon [1988] 3 MLJ 315 (refd)
United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 474 (refd)
Yii Chee Ming v Teo Ah Khing & Anor [2001] 4 MLJ 251 (refd)

Legislation referred to

Reciprocal Enforcement of Judgments Act 1958 s 5(3)(a)
Rules of the High Court 1980 O 18 r 19, O 56 r 1, O 92 r 4

James Lo (George Lo & Partners) for the plaintiff.
Alvin Yong (Tan, Yap & Tang) for the defendants.

Lau Bee Lan J:

BACKGROUND

[1] The Plaintiff, Yii Chee Ming, has appealed against my decision given on 1 April 2005 wherein I had allowed the defendants' application dated 20July 2004 (encl 150) that all further proceedings in this action be stayed with costs to be taxed unless otherwise agreed.

[2] Basically the grounds for the defendants' application for, *inter alia*, a stay of all further proceedings in this action are premised on:

(a) the plaintiff's action herein is an abuse of the process of this court;

(b) the court in the Republic of Singapore is a more natural or appropriate forum in trying the matters in dispute in this action herein;

(c) the matters in dispute between the parties in this action herein could be tried in an action in the court in the Republic of Singapore at substantially less inconvenience and expense; and

(d) it would not be unjust for the plaintiff to confine himself to remedies available from the court in the Republic of Singapore.

[3] The plaintiff has objected to the defendants' application for, *inter alia*, stay of all further proceedings in this action on the grounds of:

(a) application for stay of proceedings is *res judicata*; and

(b) the court in the Republic of Singapore is not the proper forum ie issue of *forum non conveniens*.

[4] Before I delve into the arguments pertaining to the defendants' application, it is pertinent for me to mention briefly the following facts which preceded the defendants' application which have a bearing on the application. The defendants had earlier made a stay application dated 15 September 1999 (encl 14) which was dismissed by His Lordship Dato' Zakaria Sam JC (as he then was) vide order of court dated 1 March 2001 (encl 54). Following that the plaintiff had vide a summons in chambers' application dated 28 May 2004 applied for leave to re-amend the plaintiffs writ of summons and statement of claim as per the proposed re-amended writ of summons and statement of claim (encl 134) namely, to add alternative prayers for relief ie:

WHEREFORE the plaintiff claims:

(1) a sum of S$1,722,681.95 and interest thereon from both the defendants jointly and severally or one or the other of them;

(i) ALTERNATIVELY, a declaration that the second defendant is holding 1/2 share in the property commonly known as 49Tras St, Singapore 078988, on a resulting trust for the plaintiff;

(ii) ALTERNATIVELY, a declaration that the second defendant is holding 1/2 share in the property commonly known as 49Tras St, Singapore 078988, on a constructive trust for the plaintiff.

[5] In hearing the appeal by the defendants against the learned deputy registrar's decision given on 15 July 2004 allowing the said plaintiff's application for re-amendment (encl 152), I had affirmed the said decision and dismissed the appeal on 10 September 2004.

[6] Thereafter the defendants filed the application (encl 150) for, *inter alia*, stay of all further proceedings pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC') and/or O 92 r 4 of the same, the subject matter of this appeal.

FINDINGS AND EVALUATION

(a) Res iudicata

[7] The plaintiff contended that the issue of stay of proceedings has been decided by His Lordship, Dato Zakaria Sam JC (as he then was) in *Yii Chee Ming v Teo Ah Khing & Anor* [2001] 4 MLJ 251 in relation to the defendants' summons in chambers dated 15 September 1999 for, *inter alia*, stay of proceedings (pursuant to an O 56 r 1 of the Rules of the High Court appeal) (encl 14). Basically Mr James Lo, learned counsel for the plaintiff, submitted:

(i) that the new prayers for relief do not change the plaintiff's claim in any material way;

(ii) this is because the entire case will turn on whether the defendants can show they have performed such services as will justify the plaintiff making them a gift worth millions of ringgit. The alleged services were mostly performed by the defendants in Sarawak and Malaysia; and

(iii) for the above reason, the core facts and the primary issues for trial have not been changed by the addition of the alternative prayers for relief.

[8] Mr Alvin Yong, learned counsel for the defendants, contended the issue of *res judicata* does not arise for the reasons:

(i) the original suit upon which the summons in chambers was seeking for a stay was a suit for a fixed sum of money. The suit has now evolved to one which seeks for a declaration of a trust over a property in Singapore;

(ii) the issue of holding on trust a foreign property was not raised by the plaintiff at the time of the first defendants' summons in chambers. It cannot even be said to have been contemplated by the parties;

(iii) the defendants' first summons in chambers was premised on the grounds that witnesses for the defendants were in Singapore and on issues of cost and convenience; and

(iv) the defendants' present summons in chambers is premised on legal issues ie whether a High Court of Malaysia can make an order declaring that a property in Singapore is held on trust for the plaintiff by the second defendant. This issue is pleaded for the first time in the re-amended statement of claim and encompasses new facts.

[9] The case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 was cited by Mr Alvin Yong in support.

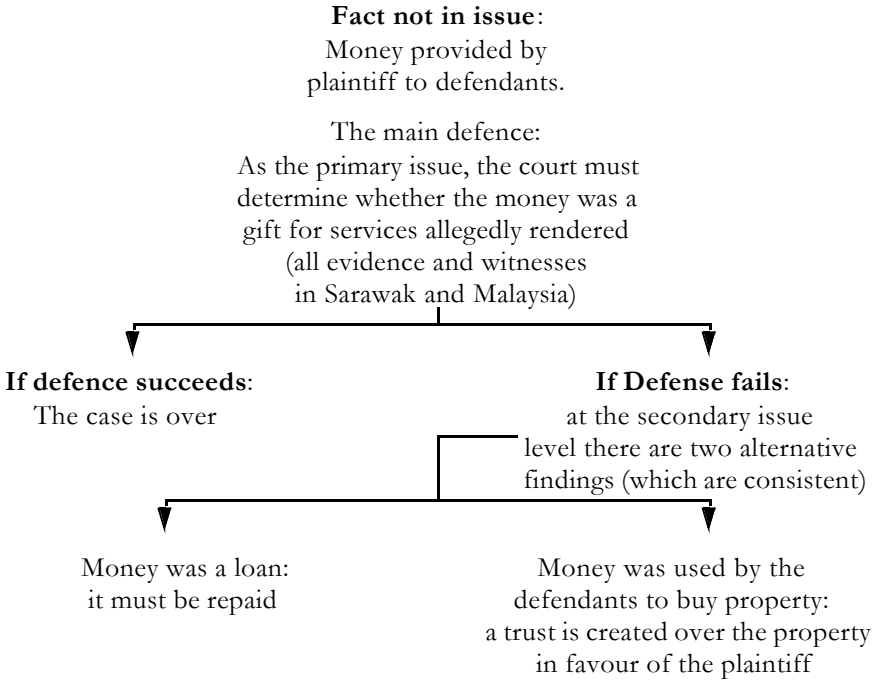
[10] Mr James Lo appeared to rely heavily on a passage of His Lordship Dato Zakaria Sam's judgment in *Yii Chee Ming* at p 500, 'If the defendants can prove that the said loan was a gift, the issue of the property being purchased in Singapore is irrelevant. With that gift, he could buy property anywhere in the world'. But it must be remembered and I stress that that dictum was made in the context of what His Lordship said at p 499, 'It must be noted that the plaintiff is not claiming for the said property purchased in Singapore but the loan he allegedly advanced to the defendants'.

[11] Since that decision, what has evolved with the re-amendment applied for by the plaintiff and allowed by this court is to create a scenario where the new prayers for relief (which the plaintiff did not deny) is not only for:

(i) for a fixed sum of money of S$1,722,681.95; but has graduated to, albeit in the alternative;

(ii) for a declaration of a trust over a 1/2 share in a property namely, 49 Tras Street, Singapore 078988 for the plaintiff.

[12] The issues for trial for the court's determination after the re-amendment which was allowed is as illustrated by Mr James Lo in the chart contained in plaintiff's submission dated 16 August 2004 (encl 161) which is reproduced as follows:


Fact not in issue:
Money provided by plaintiff to defendants.
The main defence:
As the primary issue, the court must determine whether the money was a gift for services allegedly rendered (all evidence and witnesses in Sarawak and Malaysia)
If defence succeeds:
The case is over
If Defense fails:
at the secondary issue level there are two alternative findings (which are consistent)
Money was a loan: it must be repaid
Money was used by the defendants to buy property: a trust is created over the property in favour of the plaintiff

[13] The material parts in the chart above which I wish to emphasise (asunderscored) is the third column (horizontally) ie the court is to determine:

(i) not only if the money provided by the plaintiff to the defendants (not disputed) was a loan (if it is, it must be repaid); but

(ii) whether the money was used by the defendants to buy the said property which in turn created a trust over it in favour of the plaintiff.

[14] Referring to *Asia Commercial Finance (M) Bhd* where a fixed loan of RM750,000 ('the loan') was granted by the appellant ('the finance company') to the respondent ('the borrower') for the purpose of financing a housing project. As security, several pieces of land were charged by the borrower to the finance company. The terms and conditions of the loan were contained

in a letter of offer ('the letter of offer') dated 14 November 1985 ('the date of offer') which provided, *inter alia*, that the first drawdown must be made within three months from the date of offer and that the loan would be available for 15 months from the date of offer, ie until 14 February 1987, during which time, the borrower must draw upon the loan completely or the undrawn balance would be cancelled. The time for the first drawdown was subsequently extended by the finance company to 31 March 1986. The borrower, however, failed to utilise the loan completely by 14 February 1987, and on 4 May 1987, the finance company informed the borrower that it could no longer draw down on the unused balance of RM400,000. The borrower went into financial difficulty and could not carry out the housing project. The borrower later defaulted, and the finance company successfully obtained an order of sale from the land administrator. On 22 January 1988, the borrower filed an originating motion in the High Court against the finance company, praying for, *inter alia*, an order to set aside the order for sale and damages in connection with the failure of the housing project due to the denial of the right to use the balance of the loan ('the first proceeding'). The borrower argued that when the date for the first drawdown was extended, the availability period as stipulated in the letter of offer had also been waived accordingly. The High Court dismissed the borrower's application and its appeal to the Supreme Court was also dismissed. The borrower then brought an action against the finance company in the High Court for damages on the same ground as the first proceeding. The finance company's application to strike out the borrower's statement of claim on a plea of *res judicata* was dismissed. The finance company has appealed (refer to headnote at p 189).

[15] The Supreme Court in allowing the appeal held that 'The borrower's case was a classical case for the application of the doctrine of *res judicata* by way of a cause of action estoppel. The causes of action of both the first proceeding and the present statement of claim were identical, as both claimed damages for failure of the finance company to allow the borrower to utilise in full the loan of RM750,000, causing loss consequent upon the failure of the housing development to be proceeded with further. All rights and liabilities of both parties had merged into the judgment of the first proceeding and the effect of a cause of action estoppel was absolute. (Emphasis added.)

[16] However, the facts in the instant case can be distinguished. By the re-amendment in terms of adding in the alternative prayers for relief as alluded to above, the nature of the reliefs sought for by the plaintiff are different in the manner described above unlike the facts in *Asia Commercial Finance (M) Bhd* where the claim in both proceedings were for damages. Thus, I find that the objection raised by Mr James Lo in respect of res judicata and for the defendants' application to be dismissed in limine is devoid of merit and it cannot be sustained.

(b) Forum non conveniens

[17] Both Mr Alvin Yong and Mr James Lo are like minded in respect of this issue of forum non conveniens, in that the principles enunciated in the Supreme Court case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 would apply. In the aforesaid case, the Supreme Court spelled out the principles governing the doctrine of *forum non conveniens* which it observed had its origin in Scotland and found acceptance in the House of Lord's case of *Spiliada Maritime Corp v Cansulax Ltd, The Spiliada* [1987] AC 460 and after having regard to a learned joint article by RH Hickling & Wu Min Aun, *Stay of Actions and Forum Non Conveniens* [1994] 3 MLJ xcvii. The principles governing the doctrine which can be culled from the judgment of His Lordship, Peh Swee Chin FCJ (delivering judgment on behalf of the Supreme Court) at pp 167–168 are:

(a) the fundamental principle with regard to this doctrine is that 'there is some other tribunal, having regard competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. The word 'conveniens' in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience (per Lord Goff in *The Spiliada*);

(b) the defendant would have to satisfy the court that 'some other forum is more appropriate' (per Lord Templeman in *The Spiliada*);

(c) it will be obligatory for the court to consider a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere';

(d) principle (c) 'does arise ... out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection'.

[18] From the dicta of His Lordship Peh Swee Chin FCJ, I agree with MrYong's submission that the factors in the determination of what would constitute the element of the most real and substantial connection is not exhaustive and it may include factors affecting convenience or expense (such as availability of witness), the law governing the transaction and the places where the parties reside or carry on business and the policy of the Malaysian courts in respecting the sovereignty of a foreign country (which will be alluded to hereinafter).

[19] In respect of ground (a) of the defendants' application, it is the defendants' contention that 'The plaintiffs' action has become an abuse of the process of court as the plaintiff seeks to obtain an order of the High Court in

Kuching which may become an unenforceable order as it affects the sovereignty of the Republic of Singapore. The Singapore court has indicated that they do not see it fit to make orders affecting any in land in Malaysia'. Inthis regard, the defendants cited the case of *Sunkyong International Inc v Malaysia Rubber Development Corp Bhd* [1992] 2 MLJ 146 quoting a passage from the judgment of Peh Swee Chin SCJ at p 151 as follows:

> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd v The Meridian Shipping Co SA2* is an exercise of sovereignty in that country, which can only be done with the consent of that country .

[20] Mr Alvin Yong has acknowledged that *Sunkyong*'s case is one which pertains to service out of jurisdiction of a writ issued by the Malaysian High Courts. Nevertheless Mr Yong has submitted that the principle perforce should apply in the present case as here the plaintiff is seeking for an order affecting land or property in a foreign jurisdiction which has more implications because an order affecting property will be an order in rem as opposed to one which is in personam.

[21] To also bolster his argument, Mr Yong cited the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474 where His Lordship Ian Chin J followed the decision in Sunkyong and at p 482 stated, '(T)he Supreme Court had imposed on our legal process the obligation to respect the sovereignty of a foreign country...'.

[22] Mr Yong further referred to s 5(3)(a) of the Reciprocal Enforcement of Judgments Act 1958 (Act 99) (Revised 1972) (of which Singapore is one of the scheduled countries and therefore the Act applies to it), submitting that one will note that the courts of the country of the original court shall not be deemed to have jurisdiction if the subject matter of the proceedings was immovable property outside the country of the original court.

[23] Mr James Lo in reply submitted that *Sunkyong*'s case can be distinguished because it is not a case on forum non conveniens.

[24] Mr Alvin Yong further submitted that till no date there is no reported case regarding how the Malaysian court would approach a situation of this nature but drew the court's attention to the Singapore case of *Eng Liat Kiang v Eng Bak Hern & Ors* [1995] 1 SLR 577 to show the attitude of the Singapore courts in dealing with trust matters regarding Malaysian property. Mr Yong submitted that 'The High Court of Singapore therein stayed the action and ruled that whilst the Singapore Courts have jurisdiction, the proper forum should still be Malaysia. The court held that two main factors connected the land with Malaysia were *lex situs* and *lex causae*, *lex situs* caused the land to fall automatically within the jurisdiction of the Malaysian court which was competent

to adjudicate on all questions relating to their title and possession. The law governing the creation and existence of the trust, if any over the land was Malaysian law. As a matter of enforcement, the plaintiff was far more likely to achieve the aim of his action for a declaration of trust if the declaration was ordered by the Malaysian court which could act in rem in that it will be registrable against the properties themselves.

[25] In addition Mr Yong stressed that the Singapore High Court ruled at p 587:

> ... great weight must be given to the location of the land and the undesirability of a Singapore court deciding issues of Malaysian law which would impact on the ownership of land in Malaysia. It must always be remembered that a Singapore court's decision on foreign law is treated as a question of fact for the purposes of appeal whereas a question of foreign law decided by a court of the foreign country concerned is appealable as such to the appropriate appellate court of the country. It is therefore more satisfactory for the law of a foreign country to be treated by the courts of that country: See *The Eleftheria* at p 246. Accordingly, the Malaysian court is the more appropriate court in relation to the land claim as well.

[26] The aforesaid High Court decision was affirmed by the Court of Appeal Singapore in *Eng Liat Kiang v Eng Bak Hern*.

[27] On the other hand, Mr James Lo submitted that the case of *Eng Liat Kiang* being a Singapore case is of persuasive value only and besides there were several distinguishing points as follows:

(a) In *Eng Liat Kiang*, the plaintiff sued only for declarations of trust.

  (i) Whereas in our case, the primary claim is for repayment of an advance.

  (ii) The declaration of trust is merely sought in the alternative.

  (iii) Since the most appropriate forum for the monetary claim has already been decided to be the Kuching court, it would certainly not be 'convenient' for the plaintiff to sue for a debt in Malaysia and apply for declaration of trust separately in Singapore.

(b) In *Eng Liat Kiang*, apart from Malaysian landed property, the plaintiff had also alleged that shares listed on the KLSE were held by the defendant on trust. One of the defences there was on breaches of the Malaysian Companies Act and Listing Requirements of the KLSE. Officers from Malaysian companies and from the Malaysian authorities would not be compellable in Singapore to give evidence.

  (i) Whereas in our case, the plaintiff is not claiming a trust over shares in Singapore,

  (ii) The plaintiff in our case is not alleging any breach of Singapore law.

(c) In *Eng Liat Kiang*, there was concurrently a petition filed in Malaysia seeking relief for oppression of minority shareholders.

(i) Whereas in our case, there is no concurrent legal proceeding between the same parties in Singapore which would require two courts to hear the same disputes.

(ii) Hence there is no risk of duplicity of proceedings or inconsistent findings made by two different courts.

(d) In *Eng Liat Kiang*, most of the witnesses were from Malaysia and 'there is evidence in Malaysia indicating how the proceeds of sale were dealt with which would assist in determining whether such gifts made by the plaintiff were outright gifts or not'. It was an important consideration that the evidence was in the hands of a Malaysian and the Singapore courts could not compel him to release it.

(i) Whereas in our case, the witness statements filed for the trial herein are by Malaysians. The professional relationship and all transactions between the plaintiff and the defendant took place in Malaysia. Other properties in dispute between them (which the defendant also alleges are gifts) are in Malaysia.

(ii) The weight of the evidence clearly leans in favour of the Malaysian court deciding whether the defendant had agreed that the plaintiff would be the beneficial owner of the Singapore property.

(e) In *Eng Liat Kiang*, the Singapore court stayed the prayers for declaration of trust over Malaysian land and shares, but it did not stay the prayer for declaration of trust over a piece of land in Singapore.

(i) Whereas in our case, the defendant is asking to stay the prayers for trust over Singapore land, as well as the principal prayer for repayment of Advance.

(ii) (T)he defendant's application to stay the principal monetary claim is *res judicata* the earlier judgment of this High Court. Therefore even if this honourable court were to stay the alternative prayer for declaration of trust, the principal monetary claim would still go on in this High Court. Then the plaintiff would be constrained to file the prayer for declaration of trusts in Singapore, and we would end up with a claim for debt in Malaysia and a claim under equity in Singapore.

[28] The facts of the case in *Eng Liat Kiang* are as follows. The plaintiff is the father of the first and second defendants and the husband of the third defendant. The parties have interests in various companies including Sin Heng Chan (1960) Pte Ltd ('SHC 1960'), a company incorporated in Singapore, andEng Holdings Sdn Bhd ('EH'), a company incorporated in Malaysia. On9April 1994, the first defendant filed an originating petition in the High

Court in the Republic of Singapore to wind up SHC 1960 and a few days later he filed a similar petition in the High Court of Malaya to wind up EH. The plaintiff is a respondent to both petitions. The plaintiff filed this action claiming, *inter alia*, a declaration that the first defendant holds on trust for him:

(a) the shares in SHC (1960), EH, Sin Heng Chan (Malaya) Sdn Bhd (SCH Malaya), a publicly listed company incorporated in Malaysia, and Finavest Ltd, a company incorporated in Hong Kong, registered in the first defendant's name and/or held by him;

(b) No 27 Victoria Park, Singapore, registered in the first defendant's name; and

(c) the first defendant's interest in various pieces of land in West Malaysia.

(see headnote at p 579).

[29] The first defendant filed a notice of motion seeking claims which relate to or arise out of certain shares in two companies in Malaysia and certain immovable properties located in Malaysia be stayed on two grounds that (a)the Singapore High Court has no jurisdiction in relation to the claims for immovable properties as these are in foreign lands or (b) alternatively the claims ought to be stayed on basis of the forum non conveniens principle.

[30] It is significant to note the approach and attitude of the Singapore court in dealing with matters pertaining to a declaration of trust in respect of immoveable property, particularly, the Court of Appeal Singapore in *Eng Liat Kiang*'s case, speaking through LP Thean JA at p 107 opined:

> Although the nationality and place of residence of the parties are relevant, they are not the only factors to be taken into account in deciding whether Singapore is the appropriate forum. The jurisdiction of the court is not based on the nationality and residence of the parties alone. *Great weight should also be attached to the location of the subject matters in dispute and the undesirability of a Singapore court in deciding issues involving ownership of land in Malaysia. In addition, there may be complexities involved in the enforcement of the trust in Malaysia should we declare there to be one.* (Emphasis added.)

[31] The cautious approach coupled with the reluctance on part of the Singapore courts to exercise jurisdiction is patently clear from the judgment above where the Court of Appeal, Singapore declared that it finds it undesirable to decide issues involving ownership of land in Malaysia and it envisages that there may be complexities involved in the enforcement of the trust in Malaysia should the court declare there is one.

[32] Reverting to the factual matrix of the present case, the declaration of trust (be it a resulting trust or a constructive trust) which the plaintiff seeks, albeit alternatively, is in respect of a $^1/_2$ share in property located in Singapore. Iam not persuaded by the factors put forward by Mr James Lo in attempting

to dissuade me from following the approach taken in *Eng Liat Kiang* alluded to earlier. In my view, the aforesaid case, though is only of persuasive authority, it is highly relevant from the perspective of the nature of the relief sought ie declaration of trust over property (land). It does not matter that this relief is made in the alternative by the plaintiff. This is because having had leave of the court to re-amend the writ of summons and statement of claim by adding the alternative prayers of relief, the plaintiff is in fact now seeking the court to adjudicate not only the plaintiff's monetary claim (pre-amendment) but also on the declaration of the trust, if any, created over the party in favour of the plaintiff. Given the approach and attitude of the Singapore court as reflected in Eng Liat Kiang, I am highly persuaded to believe that there is a great likelihood that the Malaysian courts would likewise adopt a similar attitude when dealing with a declaration of trust over property situated in Singapore.

[33] Mr James Lo had orally submitted that the plaintiff's action cannot be said to be an abuse of the court process based on the argument that the order which the plaintiff sought to obtain from the High Court in Kuching may become an unenforceable order as such a proposition is uncertain and premature. In Mr Lo's words, 'plaintiff is seeking for a declaration that second defendant is his trustee. How the plaintiff would direct his trustee is up to the plaintiff. There is no affidavit evidence of how the trust would be enforced later'.

[34] I respectfully disagree with learned counsel for the plaintiff that the consideration that the order if obtained may become enforceable is irrelevant or conjectural. Firstly, common sense dictates that when one institutes an action in a court of Law, one considers not only whether the action can be filed in a particular court but also whether if judgment is obtained, is it enforceable. Surely, enforcement is part of the whole process of litigation in court and which litigant, if successful, is not interested in enjoying the fruits of his success! Secondly, I am incline to agree with the learned counsel for the defendants' submission that from the position taken by our courts in respect of matters affecting the sovereignty of another country as gleaned from the cases of *Sunkyong* and followed in the case of *Wong Hai Ong*, I do not think that it would be too far fetched to foresee that given that the issue at hand is in respect of property located in Singapore and seeking for a declaration of trust at that, our court would in all likelihood take a similar stance as that taken by their Singapore counterpart as aforementioned.

[35] Furthermore, this line of argument as submitted by the learned counsel for the defendants, is in my view, fortified by s 5(3)(a) of the Reciprocal Enforcement of Judgments Act 1958 which provides that an order made affecting land (immoveable property) is not automatically enforceable in a foreign country.

[36] In the light of what has been discussed, I am more incline to agree with the defendants' submission that the plaintiff's action herein is an abuse of the process of the court.

[37] In respect of ground (b), Mr James Lo cited the case of *Syarikat Bumiputra Kimanis v Tan Kok Voon* [1988] 3 MLJ 315 to illustrate the factors stating the facts which were relevant in satisfying the court that Sabah was the appropriate forum:

(a) The plaintiff came from Sabah, the agreement was made in Sabah and fell to be performed off Sabah.

(b) There would have to be an inquiry at the trial as to an area of land identified by the agreement off Sabah.

(c) All the defendant's witnesses resided in Sabah (other than the defendant himself), some of whom were government officials'.

[38] Mr Yong submitted that the aforesaid case in fact supported the defendants' application because apart from the factors pointed out by MrJames Lo above, the Brunei High Court held that the law of Sabah would be the most appropriate law to be applied.

[39] In the context of the instant case, I am persuaded by the defendants' argument that Singapore is the more appropriate forum since the plaintiff has now pleaded and prayed for the 1/2 share in the property which is located in Singapore (undisputed fact) to be held in trust by a Singapore company ie second defendant for the plaintiff and thus the applicable law with regard to the said property and the administration of the trust should be Singapore law. This is after having regard to the fact that there is no written contract in respect of the plaintiff's action.

[40] In respect of ground (c), as it has been submitted to the court by the plaintiff that the case will turn on whether the defendants can show that they have performed the services allegedly mainly performed by them in Sarawak and Malaysia so as to justify the plaintiff making that a gift worth millions of ringgit. However, pursuant to the re-amendment granted to the plaintiff, evidence would also be led as to whether a trust has been created in respect of the property which is located in Singapore and purportedly held in trust by a Singapore company. On this ground, it is my view, that from the aspect of less convenience and expense it would inevitably even out because the plaintiff appears to be the sole witness for the plaintiff's case and likewise the defendant, gauging from the witness statements filed.

[41] In respect of ground (d) whether it would not be unjust for the plaintiff to confine himself to remedies available from the court in Singapore, again, itwould appear that the plaintiff is the sole witness and there appears to be no peculiar difficulties to be encountered by him (being resident in Sarawak) 'except to incur the inconvenience and expenses in crossing the causeway to Singapore' which the Federal Court in *American Express Bank Ltd* held did not pose as an obstacle or would be unjust on the bank customers, (the plaintiff) who were husband and wife resident in Malaysia for the Singapore Courts to try the action which the plaintiff's launched because the main protagonists from the foreign banks were residents outside Malaysia, either in London or Singapore.

[42] In the aforesaid case, the facts of the case based on the headnote (atp160) are as follows. The appellant, an international banking corporation with a branch in Singapore, and the respondents (bank customers) entered into two agreements in respect of foreign exchange transactions whereby the appellant was to assist the respondents hi their dealings which were carried out in Singapore, London and New York. The agreements contained clauses whereby the parties had agreed to be bound by the laws of Singapore and be subject to its courts. The respondents obtained leave of court to issue and serve a notice of writ out of jurisdiction alleging that the appellant had acted in fraudulent breach of a fiduciary duty owed to them by giving them false and misleading information and claimed special damages of US 10.55 million, general damages of US 10 million and costs. The appellant applied to discharge the order granting leave to issue and serve then notice of writ out of jurisdiction and to set aside the writ and service thereof on the grounds, *inter alia*, that: (i)the Malaysian courts had no jurisdiction over the matter as the alleged torts had been committed outside the jurisdiction; (ii) it was expressly agreed in the agreements that all disputes were to be determined in accordance with the laws of Singapore and by its courts; and (iii) Singapore was the more proper forum as all the witnesses were from there or elsewhere but not from Malaysia. The application was dismissed and the appellant has appealed which was allowed.

[43] The Supreme Court in deciding which particular forum is the one which the action has the most real and substantial connection being that of Singapore, took into account several factors. The factor alluded to above was one of the factors taken into account by the Supreme Court when it held Singapore was the more appropriate forum apart from other factors like foreign jurisdiction clauses in both the agreements which militate against any argument of the bank customers that Malaysian court was the more appropriate forum, all 127 foreign exchange transactions had taken place outside Malaysia ie in London, New York and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London.

CONCLUSION

[44] For the reasons adumbrated above, I find that the defendants have discharged the onus of satisfying that the court in the Republic of Singapore would be a more appropriate forum. In the circumstances, I allow the defendants' application that all further proceedings in this action be stayed with costs to be taxed unless otherwise agreed.

Defendant's application for stay of proceedings allowed with costs.

Reported by Peter Ling